No. 2974

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN TRADING COMPANY (PACIFIC COAST) (a corporation),
Plaintiff in Error,

vs.

NORTH ALASKA SALMON COMPANY (a corporation),
Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

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PERNAU-WALSH PRINTING CO.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Plaintiff in error respectfully petitions for a rehearing hereof. This petition is not presented perfunctorily but because we believe the court has not only clearly mistaken the record but enunciated an erroneous rule for law for which there is not only no supporting authority, but on the contrary is opposed to all authority on the subject. We start with the latter first.

I.

This court says (Opinion, pp. 7, 8) that we were not entitled to an instruction, *inter alia,* that it was the duty of defendant in error to furnish salmon that was merchantable or salable or capable of being used, so that if the jury should find

> "that the salmon received by the plaintiff was worthless and unfit for the purpose for which is was purchased, and was incapable of being used for human consumption, it will be your duty to return a verdict for the plaintiff for the amount paid for this salmon, with interest to the present time".

The surprising reason assigned by the court is that we did not tender defendant in error the sum of approximately $1400 retained from the sales of the salmon. No authority is cited and there is no authority therefor cited in the brief which promulgated this novel proposition.

We respectfully submit that this position is untenable because

1. At the most the amount retained could only be used by defendant in error as an offset in an action for damages. It would have been an idle formality to tender a sum less than that recoverable and the law does not require it.

Said the court in the case of

Minor v. Baldridge et al, 123 Cal. 187, 191,

> "The action is not based upon a breach of contract, nor is it necessary to have a recission of the contract to enable plaintiff to maintain his action. The theory is, that the

money was obtained upon a false representation that it had become due under the contract by the performance of the condition precedent by the corporation. This might all be, and the contract still remain in force. In such event, the corporation may yet perform and become entitled to demand and enforce payment from plaintiff".

2. This is not an action for the recission of a contract which would call for the return of the salmon, if of any value, or its equivalent. Not only was the salmon shown to have been in great part, if not entirely, valueless, but it had been judicially or officially condemned and ordered destroyed, and as the court said in the case, similar in principle, of

Hamrah et al. v. Maloof & Co., 111 N. Y. Supp. 509,

"The suggestion that the plaintiffs have failed in any equitable consideration" (because they "have not offered to restore the goods to the defendant") "is little less than an impertinence".

3. *Since this is not an action on an indemnity against loss, the financial relations of plaintiff in error with third parties, purchasers of the salmon, were wholly irrelevant here.*

At the risk of unduly prolonging this petition, we quote from the very pertinent case of

Denton Bros. v. Gill & Fisher, (Md.) 62 Atl. 627, 629.

Said the Chief Justice, speaking for that court, after reciting more at length the facts of the case (italics being ours):

> "Compressed into the narrowest compass the situation presented is this: Denton Bros. purchased from Gill & Fisher 3000 quarters of corn, and sold the same corn to Bowring & Archibald; Bowring & Archibald, through C. T. Bowring & Co., sold the same corn to Montgomery, Jones & Co. The last-named purchasers paid C. T. Bowring & Co. in full. It is alleged that there was a material shortage in the weight when the corn was delivered. Montgomery, Jones & Co. were refunded the amount of that shortage by C. T. Bowring & Co., C. T. Bowring & Co. were refunded the same amount by Bowring & Archibald, and the latter have made a demand on Denton Bros. to refund the same amount. Denton Bros. have not paid back that amount, but have sued Gill & Fisher, their vendors, to recover the sum which they, Denton Bros., are liable to pay on account of the same shortage to their vendee. The question on these facts is, *can Denton Bros. maintain this suit until they actually pay back to their vendee the amount claimed by the latter from Denton Bros. on account of that shortage?* This question is the one raised by the demurrer to the fourth count of the narr., and by the fourth instruction granted at the instance of the appellees and the second rejected prayer of the appellants. We will dispose of that question before stating or considering the other or remaining inquiry.
>
> If Denton Bros. had not resold the grain to Bowring & Archibald, and if, after they had paid Gill & Fisher the agreed price for the entire 3000 quarters of corn purchased from the latter, it had been discovered that the vendors had in fact failed to deliver over 200,000 pounds of the corn sold and paid for, it could

not be questioned that Denton Bros. would have a sustainable cause of action against Gill & Fisher for a breach of the latter's contract. *How can the resale of the corn by Denton Bros. extinguish Gill & Fisher's obligation to comply with their contract, or exonerate them from the consequences of a breach which occasions a failure of consideration?* The right of the vendee to recover from the vendor for a failure of consideration is founded on the simple fact that the former has not received from the latter what the vendor sold and agreed to deliver, and what the vendee paid for and contracted to get. The breach consists in the failure of the vendor to live up to his contract, *and no subsequent sale of the grain by the vendee can obliterate or condone that breach.* If a sale of the same commodity by the vendee to a subvendee extinguishes the responsibility of the vendor to make good a shortage to his vendee, then a payment to the subvendee by his vendor of the damages caused by the shortage would revive the first vendor's responsibility to his vendee; and thus the obligation of the first vendor to make good a deficiency to his vendee would depend, not upon his own breach of the contract of sale, but upon a collateral and independent transaction between the vendee and a third party who is a total stranger to the original contract of sale. The adjudged cases do not support that view."

Then follows a reference to a number of cases, including the leading case of

Randall v. Raper, Ellis, Black & Ellis, 84 Q. B. 4 Jur. (N. S.) 662, 120 Eng. Rep. 438.

Also:

Dingle v. Hare, 7 C. B. N. S. 145;

Muller v. Eno et al., 14 N. Y. 597,

where the syllabus states:

"The measure of damages for a breach of warranty in the sale of goods is the difference between the value of the goods if they had corresponded with the warranty and their actual value." And

"The vendee is entitled to recover although he has sold the goods at private sale in ignorance of the defect, and no claim has been made upon him on account of it. Nor is he required to prove the price at which he resold the goods. Such price may be evidence of the amount of damages, but does not furnish the rule of damages."

Passinger v. Thorburn, 34 N. Y. 637; 90 Am. Dec. 753;

Western Twine Co. v. Wright, (S. D.) 78 N. W. 942; 44 L. R. A. 438;

Wheelock v. Berkeley, (Ill.) 27 N. E. 942.

See, further:

Smith v. McNair, (Kan.) 27 Am. Rep. 117.

The latest case on the subject is

Buckbee v. P. Hohenadel, Jr. Co., (C. C. A.) 224 Fed. 14,

where it is held (quoting from the syllabus) that

"The purchaser of seed warranted to be of a specified variety, and which he resells to a grower, may recover from the dealer the actual loss due to misrepresentation as to the variety although he has not liquidated his liability to the sub-vendee for breach of warranty."

We venture to assert that no decision of an appellate court nor text writer can be found to the contrary anywhere.

II.

The jury found *in favor of plaintiff in error* (for a nominal amount of damages, however), and hence found that the salmon which was delivered by defendant in error to plaintiff in error *did not comply with the warranty* contained in the contract as to its quality, i. e., was inedible, and was contraband under the Pure Food Acts; but in discussing our assignment of errors that the verdict and the judgment entered thereon are contrary to the evidence and the court's instructions because for a nominal instead of a substantial amount, this court, apparently under the impression that the verdict was in favor of defendant in error, says (italics again ours):

> "Those assignments present to us nothing for review, since this court cannot weigh the evidence, and determine whether the verdict was contrary thereto, *there having been no request that the jury be instructed to return a verdict for the plaintiff on the ground of absence of any evidence to sustain a contrary verdict.* Our province on a writ of error is limited to the review of errors in law committed by the trial court. We have nothing to do with the evidence further than to consider its relevancy to rulings of that court to which exceptions have been duly reserved" (Opinion, pp. 5, 6).

Again the court has fallen into serious error. Bearing in mind that the jury found *in plaintiff's favor,* what instruction or direction could have been requested further than is contained in plaintiff's proposed instructions that if the jury should find a substantial part of the salmon was decomposed or in process of decomposition when brought to San Francisco and delivered to plaintiff, then its sale was void and plaintiff was entitled to a verdict for $16,961.30, with interest; or, that if the jury should find that the salmon was decomposed or contained germs producing decomposition when brought to San Francisco, and that plaintiff received it in ignorance of its true condition and relying upon its fitness for human consumption, plaintiff was entitled to a verdict for the above amount; or, that if the jury should find that the salmon was not substantially equal to the pack of the year before, then defendant had failed to comply with the warranty contained in its contract and plaintiff was entitled to recover the difference between the value which the salmon would have had at the time of delivery of the quality contracted for and its actual value at that time (Trans. pp. 162, 163, 166)? The testimony places the amount of inedible salmon all the way from 30 per cent of 2100 cases, at the very lowest, excluding "swells" *(post),* to the entire lot, i. e., from 700 cases for which $2380 was paid (at $3.40 a case), and whose value was $2800 (i. e., $4 a case), to 5000 cases for which $16,961.30 was paid, and whose

value was $20,000 (Trans. p. 56). *We could have gained nothing by asking for a peremptory instruction that the jury render a verdict for plaintiff in error, inasmuch as it did so;* a requested instruction for a verdict in our favor for the full amount claimed would have been refused on the ground that the jury might, from the evidence, find less, and that it was for them to determine the exact amount; and a requested instruction for any specific sum less than the total price paid by plaintiff in error or total amount of damages claimed would have been a waiver by the latter of all over that specific sum. Furthermore,

III.

To emphasize the oral testimony that at least 30 per cent of at least 2100 cases of the salmon was rotten *when it was imported and delivered to plaintiff in error* (and not merely that it was thereafter destroyed), the judgment roll in the case of *United States v. 2100 cases of salmon,* tried in the United States District Court for this district, was offered in evidence (Trans. pp. 98 *et seq.*), wherein it appeared that the court condemned and ordered destroyed 2100 cases of the salmon (Trans. p. 112) for the reasons set forth in the libel (Trans. p. 99), i. e., because the fish was filthy and decomposed *and was in that condition when shipped from Alaska to San Francisco.*

Referring to this judgment roll this court says (Opinion, p. 9) that

> "No question was made of the truth of that testimony, and it was clearly unnecessary to burden the record with other evidence to the same effect".

If the court will examine closely the various judgment rolls offered in evidence, it will observe that the decree in the one just referred to adjudged the condition of the salmon *prior* to the time of its delivery to plaintiff in error, whereas the decrees in the other cases condemned the salmon for its adulterated character appearing *after* its delivery. As we have heretofore said, the oral testimony on the subject was that a few months after its delivery, at least 30 per cent of at least 2100 cases of the warehoused salmon excluding "swells" was found bad and it was shown that must have been its condition when delivered (Trans. pp. 52, 70-74, 82, 85-86, etc.). The decree just referred to is a judicial determination of that fact after a hearing. Inasmuch as this court holds that it was not error to refuse admission in evidence of this judgment roll because it was cumulative evidence, it is apparent that at least to this extent we furnished "a *reasonable basis*" for determining the amount of a substantial verdict, the trial court having given an instruction to the jury (Trans. p. 174), theoretically correct under other circumstances but not here applicable or proper, that failure of plaintiff in the court below to furnish the jury

with "a reasonable basis" for recovery justified a verdict for nominal damages.

We are, then, in this position: We have requested the court to charge the jury that if they found the salmon inedible it was their duty to bring in a verdict for us for the amount paid therefor or for damages. The jury so found it, but ignoring the court's instruction that plaintiff in error was entitled to recover the purchase price of the salmon found spoiled, and the further instruction that plaintiff in error was "entitled to a verdict for the excess, if any, of market value which the salmon would have had at the date of delivery had the warranty been complied with," i. e., $4 a case, "over its actual market value at that time in the condition in which it was delivered", i. e., nothing, ignoring the warranty contained in the contract as to the quality of the salmon upon which they were likewise instructed, and ignoring the established fact that at least 30 per cent of 2100 cases of the salmon was bad, they returned a verdict for $1 damages, apparently because they believed that under some totally dissimilar circumstances not disclosed do-over salmon had not been uniformly good and that the purchaser must have contemplated such a loss when it purchased the goods.

It is apparent that the assignment of errors particularly referred to does not merit the court's criticism and does not

> "import questions into a cause which the record does not show were raised and passed on in the court below" (Opinion, p. 6).

The questions were raised from the time the demurrer to the amended complaint was first presented to the time the jury was instructed, and are, we submit, fully covered by the assignment of errors.

IV.

The court says (Opinion, pp. 6, 7) that the trial court gave, in substance, certain instructions requested by us which went to the heart of the case. Briefly speaking, those instructions were to the effect that the importation by defendant in error and delivery to plaintiff in error of this salmon, if found decomposed, were against the Pure Food Laws and did not constitute a performance of the contract, and that plaintiff in error was entitled to the return of the purchase price paid therefor, or for damages. If the trial court gave these instructions as requested, how, in view of the uncontradicted and cumulative evidence, is it humanly possible to avoid the conclusion that the jury failed to follow the instructions when it rendered its verdict for only nominal damages; or how can a verdict that the salmon was inedible be reconciled, in view of the evidence, with the finding that plaintiff in error was not either substantially damaged or entitled to a return of any of the purchase price?

The trial court, however, refused to give these instructions as requested without adding a qualifying element, to wit, the character of the goods (Trans. p. 169) as do-overs or reprocessed salmon, despite the pure food laws which recognize no such qualification, despite the warranty in the contract that the salmon should be equal in quality to the pack of the year before, i. e., perfectly edible, despite the fact that do-over salmon was recognized by the Government as a legitimate subject of commerce (Trans. p. 97), and despite the unquestioned high character of do-over fish that defendant in error had previously furnished to plaintiff in error for several successive years. In other words, the court, in substance, told the jury that if reprocessed salmon was more liable to be bad than prime salmon, defendant in error could, without violating the law or its contract, bring in a greater quantity of inedible fish of the former quality than of the latter, and hold the purchaser to his bargain just as if the salmon were edible—an utterly indefensible instruction and at variance with the earlier instructions on the subject.

We respectfully insist that the trial court did not substantially give these instructions as requested by us, but so modified or qualified them as to entirely change their character. As another instance, we asked for an instruction that if the jury found a substantial part of the canned salmon to be, when received, either decomposed or in process of decomposition, i. e., as in the case of after

developed "swells" which were shown uncontradictedly to have been in course of decomposition when delivered, plaintiff in error was entitled to a verdict for the full amount of the purchase price (Trans. pp. 162, 167 *et seq*). The court below, however (Trans. p. 168), instructed the jury that no recovery could be had for loss sustained through swells developing *after* the inspection of the salmon made on behalf of defendant in error, i. e., for cans, *the decomposition of whose contents had not then become evident but which, according to the testimony, had, when delivered, commenced to decompose and were unfit for human consumption and adulterated within the meaning of the law*— a modification of the instruction which not only destroyed its effect but also tended to cause uncertainty in the minds of the jurors as to how many tins belonged to one class and how many to the other.

V.

Again we find fault with the court's reasoning (Opinion, p. 8) by which it reaches the conclusion that we were not entitled to the instructions requested because it was

> "not contended that the contract was void at its inception or that the defendant had knowledge when the goods were shipped that any particular portion of them was unfit for consumption",

or because the salmon in question "was a doubtful commodity". The fact that the contract was not

void at its inception or that the defendant's officers were ignorant of the fact that when the goods were shipped a large or in fact any portion of them was unfit for consumption by reason of negligence little short of criminal, on the part of some of its employees, has, we submit, no discernible bearing upon the case.

The Pure Food laws, passed to prevent just such an occurrence as that giving rise to the present controversy, were supposed to be fortified by the warranty which defendant in error gave to plaintiff in error and which was designed to protect the latter against just such an imposition as was practiced here. These legislative and contractual precautions will have been taken in vain if this judgment is finally affirmed.

Of course, if the contract had been void because calling for rotten salmon no recovery could have been had, not because these salutary laws were inoperative, but because plaintiff in error would have been *in pari delicto* with defendant in error, and, furthermore, would have obtained what it had bargained for. It is of no consequence who were responsible for the canning of this salmon and what information any of the defendant's officers had on the subject before its delivery. The gist of the case is well epitomized by the court in the case of

Tyler v. Bailey, 71 Ill. 34,

where it was said:

> "In a suit to recover on a total failure of consideration, the measure of damages is, the money paid, with interest from the day of its payment till the time of recovery. This is believed to be a rule without exception. In fact, we do not perceive how any other just rule could be adopted. Appellee has received no benefit from having received these spurious warrants, he has been deprived of the use of his money, and fair dealing would require that he should, at least, recover it back, with legal interest. It then follows that the court below did not err in telling the jury that the measure of damages was the price paid, with legal interest, from the day it was paid".

Whether or no the defendant in that case knew that the warrants were spurious before they were delivered had no bearing on the case, and it was the validity rather than the invalidity of the contract that gave appellee there his standing in court.

To summarize, the *crux* of our contention was and is that under the Federal and State Pure Food Acts, as well as under the warranty as to quality contained in the contract, the vendor was obliged to deliver to the vendee the salmon in an edible condition. We proved, and the jury found, that the vendor failed in its duty, but, nevertheless, this court says that the vendee is remediless,

(1) Because it did not tender back to its vendor a small sum left in its hands on resales of the merchandise to its subvendees; and

(2) Because this quality of salmon, known as do-overs, had on other occasions and at other times

not proven uniformly good, and being an object of suspicion, virtually called for the application of the doctrine of *caveat emptor.*

The Pure Food Acts and warranty are, by force of this decision, thrown to the winds as "a mere scrap of paper". It cannot be that this court proposes to promulgate such a doctrine and unwittingly lend itself to the consummation of such an unconscionable as well as illegal transaction.

VI.

We may observe that the trial court when it finally charged the jury treated the complaint as one for money had and received, i. e., for return of money paid on failure of consideration, as well as for damages arising from the same facts, although by reason of the court's ruling in sustaining the demurrer to the third count of the amended complaint sounding in damages, plaintiff in error was precluded from proving damages outside of the market price of the salmon at the time of its delivery. While this court has in its opinion overlooked our contention that the demurrer to this third count was improvidently sustained, no reason having ever been assigned therefor and none discoverable by us by the exercise of reasonable diligence, nevertheless, as before observed, the prejudicial character of the error has been somewhat affected by the fact that the trial court repeatedly charged the jury despite its ruling on

demurrer that this was an action for damages (Trans. pp. 169, 170, 171, 174, 177), as well as for a return of the purchase price of the salmon.

We respectfully submit that a new trial of this cause should be granted for the reasons we have stated.

Dated, San Francisco,
March 6, 1918.

SAMUEL KNIGHT,
F. E. BOLAND,
Attorneys for Plaintiff in Error and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as fact and that said petition is not interposed for delay.

Dated, San Francisco,
March 6, 1918.

SAMUEL KNIGHT,
Of Counsel for Plaintiff in Error and Petitioner.